TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1948

No. 29

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, PETITIONER,

vs.

TIDEWATER TRANSFER COMPANY, INCORPORATED, A CORPORATION OF THE STATE OF VIRGINIA

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR CERTIORARI FILED MARCH 3, 1948.

CERTIORARI GRANTED MARCH 29, 1948.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

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NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, PETITIONER,

vs.

TIDEWATER TRANSFER COMPANY, INCORPORATED, A CORPORATION OF THE STATE OF VIRGINIA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

INDEX

[fol. 1] [Caption omitted.]

[fol. 2]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

Civil Action No. 3706

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, Plaintiff,

vs.

TIDEWATER TRANSFER COMPANY, INCORPORATED, a corporation of the State of Virginia, Defendant

COMPLAINT—Filed August 12, 1947

1. Plaintiff is a corporation incorporated under the laws of the District of Columbia. The matter in controversy exceeds, exclusive of interest and cost, the sum of $3,000.00. Jurisdiction in this Court is based on Par. 41 (1) Title 28 of the United States Code.

2. The Defendant is a corporation of the State of Virginia duly authorized and licensed to transact business in the State of Maryland through its compliance with Section II of Interstate Commerce Act as amended.

3. On or about September 30, 1942, the Plaintiff executed and delivered in Baltimore, Maryland, as insurer, a certain contract and insurance policy with the Defendant as insured, said policy being numbered 62321, the original of which is in the possession of the Defendant. A certificate thereof was filed in the office of the Interstate Commerce Commission, Section of Insurance, at Washington, District [fol. 3] of Columbia, on October 10, 1942, in compliance with Section II of Interstate Commerce Act as amended. The said automobile liability policy, number 62321, insured the Defendant against liability by reason of accidents in accordance with the terms of the policy and contained a duly authorized and executed "Endorsement for Motor Carrier Policies of Insurance for Bodily Injury Liability, and Property Damage Liability, Under Section 215 of the Interstate Commerce Act" which was attached to and formed a part of said policy. Said endorsement contained the following express language:

"The insured agrees to reimburse the Company for any payment made by the Company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the Company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement."

4. Under the terms of the said automobile liability policy number 62321 the insured was required to notify the insurer in writing of the occurrence of any accident, giving the time, place and circumstances of said accident, and said policy also contained the following provision:

"If claim is made or suit is brought against the insured, the insured shall immediately forward to the company every demand, notice, summons or other process received by him or his representative."

5. On or about May 12, 1943, the Defendant, in the course of its business as common carrier of freight, was involved through its motor vehicle equipment in an accident at the plant of the Joseph Dixon Crucible Company in Jersey City, New Jersey, whereby personal injuries were sustained by Carlogero Martorano and Salvatore Perrone, employees of [fol. 4] the said Joseph Dixon Crucible Company.

6. No notification in writing was given by the Defendant, Tidewater Transfer Company, Incorporated, of the occurrence of said accident to the Plaintiff, in violation of the terms of the aforementioned automobile policy, number 62321.

7. On or about February 18, 1944, the said Carlogero Marterano and Salvatore Perrone filed suit against the said Defendant in the New Jersey Supreme Court of Hudson County for personal injuries sustained in said accident of May 12, 1943; and on or about February 15, 1944, the Defendant was duly served with the complaint in the above mentioned action by service on William V. Lee, in Trenton, New Jersey, who was its designated agent for service of notices, orders and processes. The original of said designation of William V. Lee is on file with the Interstate Commerce Commission, as required under Section II of the Interstate Commerce Act as amended.

8. Contrary to the above mentioned specific terms of said automobile liability policy, number 62321, the Defendant did

not forward to the Plaintiff the summons and copy of said complaint which had been served on its duly authorized agent as aforesaid.

9. On or about March 25, 1944, an interlocutory judgment by default was entered against said Defendant, and on or about September 1, 1944, notice to assess damages in said action was served on said William V. Lee, duly authorized [fol. 5] agent for the Defendant as aforesaid. No notice of said motion to assess damages was forwarded to the Plaintiff in violation of the terms of said automobile policy. On or about October 4, 1944, a further notice concerning the assessment of damages was served on the duly authorized agent for said Defendant; and no notice thereof was sent to the Plaintiff, in violation of the terms of said policy of insurance.

10. On November 13, 1944, the New Jersey Supreme Court entered final judgment for Carlogero Martorano against the Defendant for $5,535.10, and final judgment for Salvatore Porrone against the Defendant for $185.10.

11. The Plaintiff had entered into written agreement with Peerless Casualty Company of Keene, New Hampshire, on August 30, 1937, whereby the Peerless Casualty Company was to execute certain surety bonds required as a condition precedent to operation of the insureds of the Plaintiff in those States where the Plaintiff was not licensed to transact insurance business, and wherein the insureds transacted business under Section II of the Interstate Commerce Act as amended. Said agreement provided that the liability which Peerless Casualty Company assumed as surety would be fully satisfied and discharged by the Plaintiff to the extent of One Hundred per centum of any loss or liability of any kind which should accrue because of the execution by Peerless Casualty Company of any bond executed at the request of the Plaintiff on behalf of any of the Plaintiff's insureds. On or about March 13, 1945, Carlogero Martorano and Salvatore Perrons instituted suit on surety bond [fol. 6] in which Peerless Casualty Company was surety and Defendant principal on said judgments theretofore obtained against said Defendant.

12. On or about January 18, 1945, the Plaintiff received first notice of said accident and said suits, after judgment by default had been entered against the Defendant in New Jersey.

13. On or about April 27, 1945, the Plaintiff herein entered into a non-waiver agreement with the Defendant providing that the Plaintiff, herein by undertaking the investigation and defense of the claims of said Carlogero Martorano and Salvatore Perrons, arising out of said accident, did not waive any provision or condition of said policy.

14. On or about April 2, 1945, the Plaintiff filed a motion in the suit of the said Carlogero Martorano and Salvatore Perrone against Tidewater Transfer Company, Incorporated, praying for a rule to show cause why the judgments by default should not be set aside so that the Defendant herein, Tidewater Transfer Company, Incorporated, might enter its appearance and defend the action on its merits.

15. On or about April 10, 1945, by order of Chief Justice Thomas J. Brogan of the New Jersey Supreme Court two bonds were filed with the Defendant herein as principal and Peerless Casualty Company as surety for the sums of $11,000, and $300 respectively, conditioned upon payment of said judgments in favor of said Carlogero Martorano and Salvatore Perrone, together with interest and costs in the event said judgments by default against the Defendant were not stricken out.

[fol. 7] 16. On or about July 18, 1946, by order of Chief Justice Clarence E. Case of the New Jersey Supreme Court the rule to show cause why said judgments by default should not be stricken out was discharged, and said judgments against Tidewater Transfer Company, Incorporated, were made final.

17. The Plaintiff was required to pay said judgments of Carlogero Martorano and Salvatore Perrone against the Defendant under the terms of said policy by reason of said accident together with interest, court costs and counsel fees. Under the terms of said policy heretofore referred to in Paragraph 3, the insured, the Defendant, agreed to reimburse the insurer for any payment as therein set out. No notice of said accident and of said suit having been forwarded to the Plaintiff, the Defendant is therefore liable to the Plaintiff for the full amount of said judgments heretofore paid by it, together with court costs, counsel fees and interest. The sum of $6,384.34 was paid by the Plaintiff in payment of the default judgments against the Defendants; and the further sum of $1,340.10 was expended by the Plaintiff as counsel fees and other expenses in the preparation

and trial of the aforementioned rule to show cause why the default judgments should not have been stricken out.

Wherefore, Plaintiff demands judgment against Defendant for the sum of Ten Thousand Dollars, interest and costs to the date of payment.

——— ———Plaintiff, By Theodore Sherbow, 1023 Munsey Building, Baltimore 2, Maryland, Attorney for Plaintiff.

[fol. 8] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

[Title omitted]

MOTION TO DISMISS—Filed September 2, 1947

Tidewater Transfer Company, Incorporated, by Wendell D. Allen and Francis B. Burch, its Attorneys, appearing specially herein for the sole purpose of this Motion, moves to dismiss the Complaint in this cause for the following reasons:

1. The Court lacks jurisdiction over the subject matter in that the Plaintiff has failed to allege facts which confer jurisdiction upon it.

2. Neither the Plaintiff nor the Defendant are residents of the State of Maryland.

3. To permit Plaintiff to prosecute its alleged claim in this Court would constitute an unreasonable burden on interstate commerce.

4. The summons in this case was not served upon a duly constituted attorney or agent of the Defendant authorized to accept service of process in an action such as one set forth in Plaintiff's Complaint.

5. And for other reasons to be adduced at the hearing.

Wendell D. Allen, Francis B. Burch, Attorneys for Defendant, Tidewater Transfer Company, Incorporated, appearing specially for the sole purpose of this Motion, 310-314 Equitable Bldg., Baltimore, Md.

Service of copy admitted this 2nd day of September, 1947.
Theodore Sherbow (E. M.), Attorney for Plaintiff.

[fol. 9] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

Civil No. 3706

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, Plaintiff,

vs.

TIDEWATER TRANSFER COMPANY, INC., Defendant

ORDER OF COURT DISMISSING COMPLAINT—Filed 18th September, 1947

The complaint in the above matter and the motion to dismiss the complaint having come on for hearing and the matter being submitted, and the facts showing that the plaintiff is a corporation of the District of Columbia and that the Defendant is a corporation of the State of Virginia, and the Court being of the opinion, for the reasons set forth in its earlier opinion in Feely v. Sidney S. Schupper Interstate Hauling System, Inc. and Breeding v. Same, — Fed. Sup. —, that the Act of Congress of April 20th, 1940, 54 Stat. 143, is unconstitutional to the extent that it amends Section 41(1)(b) of Title 28 U. S. C. A. by extending the jurisdiction of the Federal Courts beyond controversies between citizens of different States, it is therefore

Ordered this 18th day of September, 1947, by the District Court of the United States for the District of Maryland, that the complaint is hereby dismissed, costs to be paid by the plaintiff.

William C. Coleman, U. S. District Judge.

[fol. 10] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF MARYLAND

[Title omitted]

NOTICE OF APPEAL—Filed September 18, 1947

Notice is hereby given that the National Mutual Insurance Company of the District of Columbia, Plaintiff above named, hereby appeals to the Circuit Court of Appeals for the Fourth Circuit from the order dismissing the complaint

of the Plaintiff for lack of jurisdiction entered in this action on September 18, 1947.

Theodore Sherbow, Attorney for Appellant, National Mutual Insurance Company of the District of Columbia, 1023 Munsey Building, Baltimore 2, Maryland.

Service of copy admitted this 18th day of September, 1947.
Wendell D. Allen, Attorney for Appellee.

[fol. 11] In United States District Court

[Title omitted]

Joint Designation of Record—Filed September 19, 1947

Mr. Clerk:

Please prepare a Transcript of Record on the Appeal of the Plaintiff noted herein on the 18th day of September, 1947, and include therein the following:

1. Complaint.
2. Defendant's Motion to Dismiss.
3. Order of Court Dismissing Complaint.
4. Plaintiff's Notice of Appeal.
5. Designation as to Record.

Theodore Sherbow, Attorney for Appellant. Wendell D. Allen, Attorney for Appellee.

[fol. 12] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 13] PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 5674

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, Appellant,

versus

TIDEWATER TRANSFER COMPANY, INCORPORATED, a Corporation of the State of Virginia, Appellee

Appeal from the District Court of the United States for the District of Maryland, at Baltimore

October 1, 1947, the transcript of record is filed and the cause docketed.

APPEARANCES

Same day, the appearance of Theodore Sherbow is entered for the appellant.

Same day, the appearance of Wendell D. Allen and Francis B. Burch is entered for the appellee.

PETITION OF APPELLANT FOR CERTIFICATE UNDER SECTION 401, TITLE 28, U. S. C.—Filed October 10, 1947

Petitioner, National Mutual Insurance Company of the District of Columbia, respectfully directs the Court's attention to the Act of August 24, 1937, 28 U. S. C. Sec. 401, providing that "whenever the constitutionality of any Act of [fol. 14] Congress affecting the public interest is drawn in question in any court of the United States in any suit or proceeding . . . the court having jurisdiction of the suit or proceeding shall certify such fact to the Attorney General."

And further says that the above titled case contains such a constitutional question as contemplated by the above Act of Congress.

Wherefore, your Petitioner respectfully prays that these proceedings shall be certified to the Attorney General as provided by said Act.

And, as in duty bound, etc.

For the Appellant, Theodore Sherbow, 1023 Munsey Building, Baltimore 2, Maryland.

CERTIFICATE—Issued October 10, 1947

Pursuant to the Act of Congress of August 24, 1937 (section 401 of title 28, United States Code) the United States Circuit Court of Appeals for the Fourth Circuit certifies that in the above entitled case now pending in this Court the constitutionality of the Act of Congress of April 20, 1940 (54 Stat. 143), affecting the public interest is drawn in [fol. 15] question and that the United States or any agency thereof, or any officer or employee thereof, as such officer or employee, is not a party, and this Court having jurisdiction of said suit and proceedings certifies such fact to The Attorney General of the United States.

The United States is hereby, therefore, given permission to intervene and become a party in said case for presentation of argument upon the question of the constitutionality of such Act as The Attorney General may be advised.

October 10, 1947.

John J. Parker, Senior Circuit Judge.

October 11, 1947, certified copy of certificate, together with copy of transcript of record, transmitted by mail to The Attorney General of the United States.

October 14, 1947, brief and appendix on behalf of the appellant are filed.

November 5, 1947, brief on behalf of the appellee is filed.

ARGUMENT OF CAUSE

November 14, 1947 (November term, 1947), cause came on to be heard before Parker, Soper and Dobie, Circuit Judges, and was argued by counsel and submitted.

[fol. 16] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5674

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, Appellant,

versus

TIDEWATER TRANSFER COMPANY, INCORPORATED, a Corporation of the State of Virginia, Appellee

OPINION—December 31, 1947

Appeal from the District Court of the United States for the District of Maryland, at Baltimore. Civil

(Argued Nov. 14, 1947)

Before Parker, Soper and Dobie, Circuit Judges

Theodore Sherbow for Appellant; and Wendell D. Allen and Francis B. Burch (John C. Goddin on brief) for Appellee.

[fol. 17] DOBIE, Circuit Judge:

The National Mutual Insurance Company of the District of Columbia, a corporation of the District of Columbia, filed in the United States District Court for the District of Maryland a civil action against Tidewater Transfer Company, Incorporated, a corporation of the State of Virginia. On motion of the defendant, the District Court dismissed the action upon the ground that the Act of Congress of April 20, 1940, 54 Stat. 143, was unconstitutional insofar as it attempts to confer on the United States District Court for the District of Maryland jurisdiction over a civil action between a citizen of the District of Columbia, as plaintiff, and a citizen of the State of Virginia, as defendant. From this judgment, an appeal has been taken to us.

Section 24 of the Judicial Code, paragraph 1. (b), 28 U. S. C. A. §41(1) gave to the United States District Courts jurisdiction of suits of a civil nature "between citizens of different States;" while the statute before us added the words "or citizens of the District of Columbia, the Territory of Hawaii, or Alaska, and any State or Territory."

As far as we have been able to ascertain, the constitutionality of the Act of April 20, 1940, has never been passed upon by a federal appellate court; while a clear cut division of opinion is found in the cases dealing with this problem in the United States District Courts. The constitutionality of the statute has been upheld in *Winkler* v. *Daniels*, (E. D. Va.) 43 F. Supp. 265; *Glaeser* v. *Acacia Mutual Life Association*, (N. D. Cal.) 55 F. Supp. 925; *Duze* v. *Woolley*, (D. [fol. 18] Hawaii) 72 F. Supp. 422. The statute was held to be unconstitutional in *Willis* v. *Dennis*, (W. D. Va.) 72 F. Supp. 853; *Feely* v. *Sidney S. Schupper Interstate Hauling System* (D. Md.) 72 F. Supp. 663; *Wilson* v. *Guggenheim*, (E. D. S. C.) 70 F. Supp. 417; *Ostrow* v. *Samuel Brilliant Co.* (D. Mass.) 66 F. Supp. 593; *Behlert* v. *James Foundation of New York*, (S. D. N. Y.) 60 F. Supp. 706; *McCarry* v. *City of Bethlehem*, (E. D. Pa.) 45 F. Supp. 385.

We first consider whether Congress, in enacting the Act of April 20, 1940, proceeded under power outlined in Article 3, Section 2 of the federal Constitution which defines the limits of the judicial power of the United States, or whether Congress proceeded under Article 1, Section 8(17) of this Constitution. Article 3, Section 2 of the Constitution provides that the judicial power of the United States shall extend to controversies "between Citizens of different States"; while Article 1, Section 8(17) of the Constitution gives Congress power "to exercise exclusive legislation in all cases whatsoever" over the District of Columbia. We think that Congress here proceeded under Article 3, Section 2 of the Constitution and that we must affirm the judgment of the District Court declaring the Act of April 20, 1940, unconstitutional. Even though Congress here is deemed to have acted under Article 1, Section 8(17) of the Constitution, we still think (for reasons subsequently set out) that the Act in question is invalid.

In *Hepburn & Dundas* v. *Ellzey*, 2 Cranch 445, Chief Justice Marshall denied the jurisdiction of the United States Circuit (now District) Court on the ground that a citizen of the District of Columbia was not a citizen of a State. Said the great Chief Justice: "This depends on the act of congress describing the jurisdiction of that court." [fol. 19] While it is true that he was interpreting only a federal statute (all that was necessary for a decision of that case), it should be noted that both the Constitution and the statute used precisely the same phrase "between Citizens

of different States", hence it would seem that the phrase has the same meaning in the statute that it has in the Constitution. Chief Justice Marshall further stated in this case: "But as the act of congress obviously uses the word 'state' in reference to that term as used in the (federal) constitution, it becomes necessary to inquire whether (the District of) Columbia is a state in the sense of that instrument." We are convinced that he thought that the District of Columbia was not a State within the meaning of Article 3, Section 2, of the Constitution. Near the end of the brief opinion, he declared: "It is extraordinary that the courts of the United States, which are open to aliens, and to the citizens of every state in the union, should be closed upon them." (Citizens of the District of Columbia.)

Then he concluded: "But this is a subject for legislative, not for judicial consideration." Counsel for appellant derive great satisfaction from this sentence and contend that the Chief Justice thereby meant that Congress had the power, under Article 3, Section 2, of the Constitution, by appropriate legislation (such as the Act of April 20, 1940,) to give jurisdiction to the federal courts of suits involving citizens of the District of Columbia.

We cannot adhere to this contention of counsel for appellant. In *Willis* v. *Dennis*, 72 F. Supp. 853, 855, Judge Paul said:

> "I have little idea that the great Chief Justice intended any such meaning or that he held any such view. I have no doubt that the term 'legislative' was used in its broader sense and to emphasize the dis-[fol.20] tinction between the power to make the law and the power to interpret it, which latter only is entrusted to the judiciary. In such a sense the formulation of all laws, whether they be embodied in the Constitution or be by enactment of Congress, are legislative functions. The opinion makes it clear that the Chief Justice found the barrier to be the Constitutional provision, not the mere inaction of Congress, and it is notable that for the 136 years following this was accepted as the basis of this decision."

Judge Paul, we believe, correctly interpreted the words in the Hepburn case, and those words, even though they may be classified as dicta, are entitled to no little weight.

In *New Orleans* v. *Winter*, 1 Wheat. 89, 94, Chief Justice Marshall stated:

> "It has been attempted to distinguish a territory from the District of Columbia; but the court is of opinion that this distinction cannot be maintained. *They may differ in many respects, but neither of them is a state in the sense in which the term is used in the constitution.*" (Italics ours.)

Said Chief Justice Fuller, in *Hooe* v. *Jamieson*, 166 U. S. 395, 397:

> "We see no reason for arriving at any other conclusion than that announced by Chief Justice Marshall in *Hepburn* v. *Ellzey*, 2 Cranch 445, February Term, 1805 *'that the members of the American confederacy only are the states contemplated in the Constitution;' that the District of Columbia is not a State within the meaning of that instrument;* and that the courts of the United States have no jurisdiction over cases between citizens of the District of Columbia and citizens of a State." (Italics ours.)

[fol. 41] In *Downes* v. *Bidwell*, 182 U. S. 244, 259, Mr. Justice Brown said:

> "The earliest case is that of *Hepburn* v. *Ellzey*, 2 Cranch 445, in which this court held that under that clause of the Constitution limiting the jurisdiction of the courts of the United States to controversies between citizens of different *States*, a citizen of the District of Columbia could not maintain an action in the Circuit Court of the United States." (Italics ours.)

Then, in *O'Donoghue* v. *United States*, 289 U. S. 516, 543, we find this statement of Mr. Justice Sutherland:

> "After an exhaustive review of the prior decisions of this court relating to the matter, the following propositions, among others, were stated as being established:
>
> '1. That the District of Columbia and the territories are not States, *within the judicial clause of the Constitution giving jurisdiction in cases between citizens of different States.*'" (Italics ours.)

These cases seem to establish the doctrine that Congress, when its acts under Article 3, Section 2 of the federal Constitution has no power to confer upon the District Courts of the United States jurisdiction over civil actions based upon the fact that some of the litigants are citizens of the District of Columbia. Indeed, we go further and assert that, whatever practical inconveniences or injustices may be thereby entailed, this doctrine is sound in principle.

The cases in the District Courts, holding the Act of April 20, 1940, constitutional seem to concede that this Act cannot be sustained under Article 3, Section 2, of the federal Constitution. These cases are grounded in the doctrine [fol. 22] that Congress here proceeded under Article 1, Section 8, of the Constitution, which gives to Congress power "To exercise exclusive legislation in all Cases whatsoever, over" the District of Columbia, and that the Act of April 20, 1940, is valid as an exercise of Congressional power under Article 1, Section 8, of the Constitution. *Winkler* v. *Daniels*, 43 F. Supp. 265; *Glaeser* v. *Acacia Mutual Life Association*, 55 F. Supp. 925. With this doctrine we cannot agree.

True it is that the legislative power of Congress over the District of Columbia under Article 1, Section 8, of the Constitution is plenary and far-reaching. Said Mr. Justice Shiras in *Shoemaker* v. *United States*, 147 U. S. 282, 300:

> "* * * the United States possess full and unlimited jurisdiction, both of a political and municipal nature, over the District of Columbia, * * *."

Strong language to the same effect was used by Associate Justice Miller (of the United States Court of Appeals for the District of Columbia) in *Neild* v. *District of Columbia*, 110 F. (2d) 246, 249-251:

> "That delegation is sweeping and inclusive in character, to the end that Congress may legislate within the District for every proper purpose of government. Within the District of Columbia, there is no division of legislative powers such as exists between the federal and state governments. Instead there is a consolidation thereof, which includes within its breadth all proper powers of legislation. Subject only to those prohibitions of the Constitution which act directly or

by implication upon the federal government, Congress possesses full and unlimited jurisdiction to provide for [fol. 23] the general welfare of citizens within the District of Columbia by any and every act of legislation which it may deem conducive to that end. In fact, when it legislates for the District, Congress acts as a legislature of national character, exercising complete legislative control as contrasted with the limited power of a state legislature, on the one hand, and as contrasted with the limited sovereignty which Congress exercises within the boundaries of the states, on the other."

Even so, we conclude that to a very great extent at least, these powers are territorial. We think Judge Way went too far when he spoke of "the practically unlimited powers granted to Congress over the District which necessarily include jurisdiction over its citizens." *Winkler* v. *Daniels*, 43 F. Supp. 265, 268.

We can find no comfort for the appellant here in *O'Donoghue* v. *United States*, 289 U. S. 516. Quite the contrary. That case held specifically: "The Supreme Court and the Court of Appeals of the District of Columbia are constitutional courts of the United States, ordained and established under Art. III of the Constitution." This case has come in for some rather severe criticism. For notes on this case, see 47 Harv. L. Rev. 133; 28 Ill. L. Rev. 569; 9 Ind. L. J. 318; 22 Georgetown L. J. 91; 32 Mich. L. Rev. 103; 2 Geo. Wash. L. J. 84. On this point, however, the *O'Donoghue* case has not been overruled and still remains the law of the land.

In this same case, it was held that Congress (under Article 1, Section 8, of the Constitution) could also confer upon these local courts of the District of Columbia jurisdiction over "administrative or legislative functions" but that this may not be done with federal constitutional courts (established under Article III of the Constitution) outside of [fol. 24] the District of Columbia. 289 U. S. at page 551. Then (on this same page) Mr. Justice Sutherland points out that this dual power of Congress over the courts of the District of Columbia "is not in conflict with the view that Congress derives from the District clause (Article 1, Section 8, of the Constitution) distinct *powers in respect of the constitutional courts of the District (of Columbia) which Congress does not possess in respect of such courts outside the District (of Columbia)*." (Italics ours.)

If Congress, in creating these courts of the District of Columbia (which are local, *sui generis* and sit only within the territorial confines of the District) acted *even partially* as the *O'Donoghue* case held) under Article 3 of the Constitution, then *a fortiori* (it seems to us) Congress, in attempting to vest jurisdiction in the far flung constitutional District Courts in all forty-eight of the States and even beyond, must be deemed to have acted *exclusively* under Article 3, Section 2, of the Constitution. We can draw no other rational conclusion from the quoted language of Mr. Justice Sutherland in the O'Donoghue case.

Germane in this connection are the words of Chief Justice Taft in *Postum Cereal Co.* v. *California Fig Nut Company*, 272 U. S. 693, 700:

> "The distinction between the jurisdiction of this Court, which is confined to the hearing and decision of cases in the constitutional sense, and that of administrative action and decision, power for which may be conferred upon courts of the District, is shown in the case of *Keller* v. *Potomac Electric Company*, 261 U. S. 428, 440, 442, 443. There it is pointed out that, while Congress in its constitutional exercise of exclusive legislation over the District may clothe the courts of the [fol. 25] District not only with the jurisdiction and powers of the federal courts in the several States but also with such authority as a State might confer on her courts, *Prentis* v. *Atlantic Coast Line Company*, 211 U. S. 210, 225, 226, and so may vest courts of the District with administrative or legislative functions which are not properly judicial, it may not do so with this Court or any federal court established under Article III of the Constitution."

Said Judge Conger, at the end of his opinion in *Behlert* v. *James Foundation*, 60 F. Supp. 706, 709:

> "I am convinced that while Congress, under Article I, Section 8, Clause 17 of the Constitution, may provide jurisdiction to the Courts of the District of Columbia beyond that prescribed by Article III, Section 2 of the Constitution, it may not do so with this Court or any Federal Court established under Article III, Section 2 of the Constitution."

See, also, the language of Judge Paul, in *Willis* v. *Dennis*, 72 F. Supp. 853, 854-855; the language of Judge Coleman in *Feeley* v. *Sidney S. Schupper Interstate Hauling System*, 72 F. Supp. 663, 665-666; and the language of Judge Waring, in *Wilson* v. *Guggenheim*, 70 F. Supp. 417, 419, as to Article 1, Section 8, of the Constitution, which was as follows:

> "* * * But it is quite apparent from the language of the Constitution itself that it was intended to give to the Congress the right to legislate regarding matters within the territory to be ceded * * * Nowhere does it appear except by the most strained of constructions that this was intended to give to Congress the right to legislate in regard to the courts which had been authorized and circumscribed by Article 1, Section 3,* [fol. 26] hereinabove referred to, and which lay outside of this territory."

We are in full accord with these expressions.

Our conclusion is that Congress, in enacting the Act of April 20, 1940, did proceed under Article 3, Section 2, of the Constitution, defining the judicial power of the United States, and that the Act is therefore unconstitutional. We further conclude that any attempt by Congress to proceed here under Article 1, Section 8, of the Constitution, giving Congress exclusive legislative power over the District of Columbia, would likewise lack validity. Article 1, Section 8, of the Constitution is not to be interpreted and applied as if it were an isolated provision standing alone and apart from the other provisions in that great document; rather is it conditioned by, and to be interpreted in the light of, companion articles. Article 1, Section 8 is thus limited by Article 3, Section 2. These two articles must be construed together so as to harmonize the two and give meaning to each; one article cannot be interpreted to flout what appears to be the clear meaning of the other. Congress, therefore, cannot, extend beyond the constitutional limits the jurisdiction of the United States District Courts under the guise of exercising its legislative prerogative that is limited to the District of Columbia.

Counsel for appellant have cited a number of cases in which the District of Columbia has been held to be a

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* This reference should be Article 3, Section 2.

"State" within the meaning of various provisions of the federal Constitution other than Article 3, Section 2. We do not find these cases helpful in deciding the instant case. This same argument was made in the *Hepburn* case, wherein [fol. 27] Chief Justice Marshall, 2 Cranch at page 453, tersely observed:

> "Other passages from the constitution have been cited by the plaintiffs, to show that the term state is sometimes used in its more enlarged sense. But on examining the passages quoted, they do not prove what was to be shown by them."

"Turn to the article of the constitution of the United States, for the statute cannot extend the jurisdiction beyond the limits of the constitution." *Hodgson & Thompson* v. *Bowerbank*, 5 Cranch 303. We must recognize this stern admonition of Chief Justice Marshall, and we accordingly hold that the Act of April 20, 1940, is unconstitutional.

For the reasons aforesaid, the judgment of the District Court dismissing appellant's complaint must be affirmed.

Affirmed.

PARKER, Circuit Judge, dissenting:

I cannot concur in the decision that the Act of Congress conferring jurisdiction on the District Courts of the United States of suits between citizens of the District of Columbia and citizens of the several states is violative of constitutional provisions or transcends the power of Congress under the Constitution. The securing of justice for its people is one of the first duties of government. With respect to domestic matters this duty is discharged through the maintenance of domestic courts; where justice as against citizens of other countries is sought, the citizens *is* not left to the [fol. 28] mercy of foreign courts but may call upon his country to protect him through its diplomatic service. Under the dual sovereignty of our federal union, the courts of each of the states furnish a foreign jurisdiction so far as the citizens of other states are concerned, for every state court is the agency of a quasi sovereign power to which citizens of the other states of the Union owe no allegiance and over which they have no control. The states, however, as members of the Union, are denied the power of inde-

pendent nations to pursue justice in behalf of their citizens through diplomatic channels against citizens of other states; and, in lieu of this, the Constitution provides courts of the federal government, the government of all the people of the country, to administer justice in cases where citizens of different states are involved, so that neither party may be required to seek justice from the state of his adversary. This reasoning I understand to lie at the basis of the jurisdiction of the federal courts in diversity cases; and, while I do not think that the District of Columbia is a state within the diversity clause of Art. III of the Constitution, I cannot believe that the citizens of the capital city of the Republic have been left in such position by the Constitution that they cannot be afforded the protection with respect to this fundamental matter that is given all other citizens.*

[fol. 29] It is well settled that the District of Columbia is not a state within the meaning of the Constitution; and, if the power of Congress to vest jurisdiction in the federal courts were limited to that which may be exercised under Art. III, I would think the legislation here involved to be beyond its power. It is equally well settled, however, that Art. III does not express the full authority of Congress

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* The question involved is not a theoretical one, but one of great practical significance. To deny to a citizen of the District the right to resort to the federal courts, means that he must seek justice in a court of the state of his adversary, where he will find, in many of the states, that trial by jury has been stripped of many of its safeguards, and the judge has been denied the common law powers necessary to the proper administration of justice. See article by Judge Merrill E. Otis, *Journal of American Judicature Society*, vol. 21, p. 105 et seq. To require a non resident to try his case in such a tribunal is not only to turn him over to the tender mercies of a local jury, without power in the presiding judge to counteract the appeals to prejudice of local counsel, it is also to deny to him the sort of trial by jury which as a citizen of the United States he is entitled to have in the federal courts. *Herron* v. *Son. Pac. Ry. Co.*, 283 U. S. 91, 95; *Patton* v. *U. S.*, 281 U. S. 276, 288; *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13-16; *U. S.* v. *Philadelphia & R. R. Co.*, 123 U. S. 113, 114; *U. S.* v. *Fourteen Packages of Pins*, 1 Gilp. 235, 25 Fed. Cas. (No. 15, 151) 1182, 1189.

to create courts." *Ex Parte Bakelite Corporation*, 279 U. S. 438, 449. Congress may vest judicial power in courts to hear litigation affecting citizens of the District of Columbia; and I see nothing in the Constitution to forbid such power being vested in the ordinary federal courts created under Art. III. It has been decided that Congress may vest in courts created under Art. 1 sec. 8 the jurisdiction which it is authorized to confer under Art. III. *O'Donoghue v. United States*, 289 U. S. 516. On the same principle it may vest in courts created under Art. III the judicial power, but of course not the non-judicial power, which it is authorized to confer by Art. 1 sec. 8.

No one would dispute, I think, the power of Congress to create courts to hear any litigation to which a citizen of the District of Columbia is a party. Such power is inherent in the full power of sovereignty exercised over the District, a power which combines that of the general government and the states. *O'Donoghue* v. *United States, supra; Stantenburgh* v. *Hennick*, 129 U. S. 141, 147. It seems equally clear that Congress could authorize such courts to sit and their process to run anywhere in the country. If this can be done, I see no reason why Congress cannot combine the jurisdiction of such courts with that of the ordinary federal courts already created under Art. III. Where the question of the validity of an act of Congress is raised, the question is [fol. 30] not under what provision of the Constitution it has purported to act, but whether, when all provisions of the Constitution are considered, it has transcended the total of the powers granted it by the people. In this case I do not think it can be said that Congress has transcended its powers; and I say this without reference to the well settled doctrine that an act of Congress may not be declared unconstitutional unless its violation of constitutional provisions is established beyond reasonable doubt.

It is suggested that the power to create courts for citizens of the District is limited geographically to the District; but there is nothing in the Constitution from which any such limitation can be spelled out. It should be noted that the power of Congress is not merely to exercise exclusive legislation over the District, but also to make all laws necessary and proper to that end, which certainly would seem to authorize legislation necessary to secure a proper administration of justice for its citizens. See Art. I sec. 8 (17) and (18). The power to legislate for the citizens of the District,

as we have seen, is full legislative power, combining that possessed by Congress and a state legislature and, except for express limitations contained in the Constitution itself, analogous to the full power possessed by the Parliament of England. Certainly, if Congress is not limited by the territorial boundaries of the country in creating courts to provide a proper administration of justice for citizens resident or doing business in foreign countries, such as consular courts (*In re Ross*, 140 U. S. 453) or the United States Court for China (Ex Parte Bakelite Corp., 279 U. S. 438, 451), there is no reason why it may not provide judicial facilities for citizens of the District of Columbia beyond the limits of the District, for the power to legislate for their [fol. 31] protection in this regard is just as clearly given as the power to legislate for citizens of the country resident or trading abroad. That the protection is exercised in this rather than in a foreign country would seem to support rather than to negative the right to exercise it.

The fact that Congress may not confer on the District Courts jurisdiction of suits in which citizens of states are involved unless there is diversity of citizenship, furnishes no argument that the power does not exist with respect to suits involving citizens of the District; for the only authority in the former case to vest judicial power in the courts arises under the provision relating to diversity of citizenship, whereas in the latter case full power is granted to legislate for citizens of the District. That the diversity clause is construed so as not to apply to citizens of the District is an added reason for construing the provisions of Art. I sec. 8 as authorizing legislation which would make the federal courts available to them; for it is not reasonable to suppose that the founders of our government intended that it be powerless to afford the protection of its own judiciary to citizens of its capital city.

More than a century ago Chief Justice Marshall pointed out what he thought was the extraordinary situation that, under the Judiciary Act, the District Courts of the United States, which were open to aliens and to citizens of every state in the Union, should be closed to citizens of the nation's capital. Since then the capital has become a large and flourishing city with citizens who trade and travel and do business throughout the Union. The right to invoke the jurisdiction of the only sovereignty to which they owe

allegiance and to which they can look for protection has become an increasingly important one and has at length [fols. 32-33] been recognized by Congress in the passage of legislation, which opens the federal courts to them on the same conditions that these courts are open to other citizens of the Republic. For the reasons which I have endeavored to set forth, I do not think this salutary legislation beyond the power of Congress, when the provisions of Art. I sec. 8, as well as the Third Article of the Constitution are considered.

[fol. 34] UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT

No. 5674

NATIONAL MUTUAL INSURANCE COMPANY OF THE DISTRICT OF COLUMBIA, Appellant,

vs.

TIDEWATER TRANSFER COMPANY, INCORPORATED, a Corporation of the State of Virginia, Appellee

JUDGMENT—December 31, 1947

Appeal from the District Court of the United States for the District of Maryland

This Cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Maryland, and was argued by counsel.

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed with costs.

Morris A. Soper, U. S. Circuit Judge. Armistead M. Dobie, U. S. Circuit Judge.

I dissent:

John J. Parker, Senior Circuit Judge.

[fol. 35] In United States Circuit Court of Appeals

January 23, 1948, petition of appellant for a stay of mandate is filed.

Order Staying Mandate—Filed January 26, 1948

Upon the Motion of the appellant, by its attorney, and for good cause shown,

It Is Ordered that the mandate of this Court in the above entitled case be, and the same is hereby, stayed pending the application of the said appellant in the Supreme Court of the United States for a writ of certiorari to this Court, unless otherwise ordered by this or the said Supreme Court, provided the application for a writ of certiorari is filed in the said Supreme Court within 30 days from this date.

January 24, 1948.

John J. Parker, Senior Circuit Judge.

[fol. 36] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 37] Supreme Court of the United States

Order Allowing Certiorari—Filed March 29, 1948

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fourth Circuit is granted. In view of the Act of August 24, 1937, 28 U. S. C. Sec. 401, the Court hereby certifies to the Attorney General of the United States that the constitutionality of the Act of April 20, 1940 (c. 117, 54 Stat. 143), is drawn in question in this case.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.